THE LEAGUE OF NATIONS AND THE LAWS OF WAR.

INTRODUCTION.—Everyone would agree that the renovation of international law presents a problem of commanding importance. Diversity of opinion is manifested, however, as soon as attention is directed to the details of the renovating process. Where to begin, what to emphasize, and how to go about it are questions which provoke a medley of discordant answers. Out of this medley a few paramount issues are beginning to emerge. One such issue concerns the so-called law of war. What shall be done about it? The World War revealed its lack of sanction, its confusion with self-interest, its chaotic uncertainty. Can it really be elevated to the dignity of law? There are excellent jurists who believe that it can and that the result will be worth the effort. Others are skeptical. The following paper is without doubt one of the most illuminating and significant discussions of the subject which has appeared up to the present date. It was first published less than a year ago in the British Year Book of International Law. It has attracted a great deal of attention in Great Britain, and some attention, although not so much as it deserves, in this country. It is reprinted in this issue of THE MICHIGAN LAW REVIEW, with the generous permission of the Editors of the Year Book, and also of the publishers, Henry Froude and Hodder & Stoughton, in the hope that a real service may be rendered by affording it wider publicity among those whose opinions will weigh heavily in influencing the decisions to be made.—THE EDITORS.

THE second of President Wilson's famous Fourteen Points stipulated for the "absolute freedom of navigation upon the seas outside territorial waters, alike in peace and war, except as the seas might be closed in whole or in part by international action for the enforcement of international covenants."

On this point the Allied Powers in agreeing to the Fourteen Points as the basis of the terms of Armistice made special and definite reservations. Perhaps for this reason the freedom of the seas never became an issue at the Peace Conference. But at one time it nearly did so; and the question is one which is still sometimes discussed, and which will certainly be raised again in the near future.

It is worth while, therefore, to consider more carefully exactly what this second point as defined by President Wilson really meant.

First, it may be pointed out that the absolute freedom of the seas in time of peace is agreed to by every one, and has been effectively acted upon for a century at least. Second, "the closing of the seas for the enforcement of international covenants by a League of Nations" is similarly agreed to, and was embodied by the Peace Con-

ference in Article 16 of the treaty. The establishment of the supplementary international law which is required for this purpose, if any is required, is in principle at least a simple matter. Therefore, the controversial matter on which President Wilson by his second point wished to establish legally defined rules is narrowed down to the law of "private" war at sea: the meaning of his point is merely this, that he wished to set up a code of rules for the conduct of wars between individual states undertaken without the sanction of the League. In other words, if the second point had been acted upon it would have been necessary for the Peace Conference to rewrite a large chapter of the laws of war, in exactly the same manner as had been done by the Hague Conference in 1907, and as the Conference of London attempted to do two years later.

A similar but more general proposal, emanating from a weighty source in this country, deserves attention. In his book written in 1918, Lord Phillimore proposed that the amendment of the laws of war and the provision of some means for their enforcement should be part of the work of the Peace Conference, and that when these new rules were completed they should be inserted into the final treaty. He made this proposal, to quote his own words, "for two reasons; first, to make war when it does occur less intolerable than the present war has been; secondly, to prevent war by taking away from some nations the temptation to rely on their superior capacity of committing atrocities as an element of success in war." Lord Phillimore's proposal had no more success than President Wilson's second point as an issue at the Peace Conference; but the idea on which both were based, that it was essential for the future that the laws of war should be rewritten by an international authority of high standing, has not yet been abandoned. The proposal now takes the form that the League of Nations should take up the question and should continue the work of the Hague Conferences, by devoting its attention to the codification of rules for the conduct of military operations. The latest exponent of this idea is Mr. Winston Churchill, who recently said in the House of Commons that the use of poison gas in future warfare is a question which should be regulated by the League.

In view of the history of the Hague Conferences, and of the high authority behind the proposals which have been quoted, it is worth while to examine carefully the motive ideas of Lord Phillimore, who

states the proposition more generally and more clearly than any one else has done.

An attempt will be made to consider these ideas, and the conclusions deduced from them, from two different points of view; first, in relation to the facts of modern warfare and the nature of modern intercourse between nations; second, in relation to the history of the laws of war and the historical traditions of international jurisprudence. An attempt will also be made to draw from the considerations put forward certain conclusions as to the future action of the League in connection with the subject under review.

I

It must be said at once that Lord Phillimore's motive ideas seem to spring from a misconception of the whole character of modern war. In the first place, it is almost inconceivable that any nation which is contemplating a declaration of war would be prevented from declaring it by conventional limitations on the use of force agreed to in any international code of rules. The only possible case is that of Great Britain had she accepted President Wilson's second point as it stood. But, in fact, if wars between individual states continue, no such sweeping limitations of force will be agreed to, for they are contrary to the nature of war. In the second place, it is a complete misconception to imagine that any future war between great Powers (which is the sort of war to which the rules must be adapted and which really is the only sort worth consideration) can by any laws whatever be rendered "less intolerable" than the late war. War is intolerable in proportion to the destruction of life and property it affects, and it is certain that if wars between individual states continue they will become not less destructive but more so. This is a necessary consequence of the application of science to warfare, and cannot be prevented except by the prevention of war itself. Any future war will be incomparably more intolerable than the late war has been.

This last point may perhaps be carried a little further. As the scale of war increases it becomes not merely the function of an army or a navy but an effort of the whole of society, so its hardships and horrors must spread to every class of society. The use of violence against women and children, especially at sea, caused great indignation during the late war, but clearly women and chil-

dren working in a munitions factory are a legitimate object for bombardment, and so are the encampments of Women's Auxiliary Forces. Similarly, the increase in the number of aircraft and in the size of bombs already developed makes it certain that in the next big war the destruction of whole towns by aerial bombardment, as complete as their destruction now is by artillery, will be allowed by any rules of war that are likely to gain acceptance. Such destruction will make the life of the civilian population of a belligerent state very much what the life of the soldier in the trenches has been in the last five years. Moreover, without exception the most effective weapon in the late war was the starvation by blockade of the whole civilian population of enemy countries. It is certain that if wars between individual states continue, the belligerents will not give up this weapon. It is therefore a platitude accepted by every military thinker that no rules can prevent any future war from damaging civilian populations infinitely more than they were damaged during the late war.

There is a further vital difficulty connected with the protection of neutrals in any future war between individual states. Modern war being an effort by the whole of society, the whole activity of society, including all trade with neutral states, contributes to military success. Belligerents have the strongest interest to stop the whole of such trade by their enemy. No law defining neutral rights could be devised that would not be broken whenever a belligerent felt strong enough to break it. It is for this reason and owing to the international interdependence of interests from which it springs that any future war will, like the past one, tend to become universal, and it is for the same reasons that the neutrals have shown such a striking willingness to accede to the League of Nations.

If, then, the codification of the laws of war can by the nature of modern warfare do nothing to better the lot of civilians or to render war generally less intolerable than it has been, and if such codification will not really help either to prevent the outbreak of war or to protect the interests of neutral states when it has broken out, the drawing up of such rules would seem prima facie to be both a thankless and a barren task. Fortunately, the Peace Conference decided after slight hesitation that it was not a task that it was worth while to undertake. The Conference was right in judging that little good could come of any attempt to establish rules which would require

a most effective League of Nations for their maintenance before the League itself had been established. And even now that the League has been established there are other general considerations which make it equally doubtful whether the League can any more usefully occupy itself in codifying the rules of war than the Peace Conference could do.

For example, it may well be doubted whether any rules which could at present be devised would really be adequate to the conduct of the next war. The whole nature of warfare alters with the progress of invention, and in accordance with that change of nature the law must change too. The late war demonstrated nothing more clearly than that the law of sea warfare as it stood in 1914 would have been, even had it been observed, totally inadequate to the operations which it should have controlled. Similarly, no rules of warfare at sea drawn up in 1920 could be adequate to the naval operations of 1940. The future of the hydroplane and of the submarine as weapons against merchant shipping, and that of the aeroplane as a carrier of contraband, are by themselves problematic enough to make even the attempt to devise such rules almost certainly unfruitful. And there is this further consideration: if a fixed code of rules were to be drawn up by the League of Nations, and if subsequently invention were to change again the nature of warfare, the fixed code of rules which had been established would be worse than none, for no rule which was contrary to the nature of war would be observed, and a rule that is not observed only serves to discredit the law, and to drag other nations into a quarrel from which they might have kept clear.

There is a further reason, and a most important one, why the codification of the law of war is a task which it is most difficult for the League of Nations to attempt. Almost every question connected with the laws of war is necessarily controversial, and for the last half century has become increasingly so. But there is no part which is so controversial as the relations between belligerents and neutrals. Yet this is the centre of the whole code of the law of war at sea. If there are not rules effectively to control the relations of belligerents and neutrals there is no law of war that is worth consideration. Even before the last war this was a subject on which agreement was exceedingly difficult to secure. The whole matter was discussed at the Hague and parts of it again at the Con-

ference of London in 1909. The rules which were thus laboriously evolved were afterwards rejected by the very Governments which drew them up. At the present time, so far as sea warfare at least is concerned, there are hardly any accepted principles from which discussion could even begin. "It has become apparent," Oppenheim wrote in a private memorandum in 1917, "that international law concerning the rights of neutrals in sea warfare is entirely unsettled." The extreme divergence of the views which would be put forward if the subject were raised is illustrated by the fact that many people in Great Britain would wish not only not to extend the rights of neutrals in the sense proposed by President Wilson, but would on the contrary wish to denounce the Paris declaration of 1856. The fact of the matter is this, that the interests of a belligerent with sea power are so sharply in conflict with those of neutrals that probably no settlement could be arrived at which would be generally accepted.

The first general proposition which is here put forward is that the Governments of the world who have combined to establish the League of Nations would make a disastrous mistake if they proposed to use the new machinery which they have set up to solve the old problems connected with the codification of the laws of war. The task with which the League of Nations should deal is rather the building up of a new body of international law for time of peace. There are innumerable problems of international life, innumerable conflicts and coincidences of national interest for which an effective body of law is required. It is hardly necessary to mention the questions of communication, transit, of colonial policy, of public health, of labour legislation, and of the settlement of disputes for which international law has hitherto failed adequately to provide, but which cannot any longer be avoided.

The second contention which is now put forward, and which will be examined further in the second part, is that the failure of international law to provide solutions to the problems of peace has been at least in part due to the fact that the attention of writers and statesmen has always been diverted from the law of peace to the law of war. This preoccupation with the law of war has not only diverted attention from the difficult, but infinitely more important problems of peace, it has also rendered comparatively barren efforts at international "legislation" which might have led to the best re-

sults. There is also at least a case for thinking that it has undermined the whole moral force of international law in the minds of people at large. A law, of which the most discussed and the most conspicuous part, and of which it was often erroneously asserted that the only "real" part, was the law of war, could not command much popular respect. Every war produced violations of its rules, and even more allegations that they had been violated. These violations left the injured party with no sanction but that of reprisals—"of no use unless you are the stronger side," as Lord Phillimore has said. For these reasons Westlake (*Collected Papers,* p. 238) holds that the rules that control hostilities are the worst and weakest part of international law; and yet it is by this worst and weakest part that international law has always been popularly judged and discredited.

Of all this, the most unfortunate result is that this diversion of attention from the law of peace has left that law seriously inadequate to the subject matter it should control. The League of Nations must not delay in taking up the task which this inadequacy throws upon it. For in the view taken in this paper it is the chief task of the League to remove this inadequacy, and by the development of true legal processes, and by the establishment of the authority of international covenants and law in time of peace, to work out a stable system for the world.

II

An attempt will now be made very briefly to sketch the historical background of the two main contentions put forward in the first part, namely, that the preoccupation of writers and statesmen with the laws of war has been a real obstacle to the progress of international law, and that it is by the development of the law of peace, rather than by renewing the attempts to codify the law of war, that a stable international system can be built up by the League of Nations.

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It was the great work of Grotius which first established the predominance of the laws of war in the study and exposition of international law. That Grotius himself should have thought the laws of war of paramount importance is explained by the motive which made him devote his labours to "the noblest part of jurisprudence."

That motive he thus explains: "I, holding it to be most certain that there is among nations a common law of rights which is of force with regard to war and in war, saw many and grave causes why I should write a work on that subject. For I saw prevailing throughout the Christain world a licence in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reason or no reason; and when arms were once taken up all reverence for divine and human law was thrown away, just as if men were thenceforth authorised to commit all crimes without restraint." (Whewell's Translation, Preliminaries, par. 28.)

Grotius' motive, then, in laying the foundations of the modern law of nations was to mitigate the horrors of the wars which in his day ravaged Europe. It was natural, therefore, that the scheme of his book (Preliminaries, pars. 32-5) should show war as the basis or the source of almost all his reflections and studies. It was this characteristic of his book which established among exponents of jurisprudence the tradition, which has survived to the present day, that the chief function of international law and the sphere in which it achieves most indisputably real "positive" existence, are both to be found in the laws of war.

The reasons why this tradition was established so firmly, and has endured so long, are the following. In the first place, Grotius achieved a brilliant success in the object for which he wrote. Not only did his work have a great literary success, but it was the cause of an immediate and permanent improvement in the practices of war. The atrocities of the Thirty Years' War were not reproduced in the wars of the next two centuries after he wrote; and war being then conducted by small armies, the misery it inflicted when those armies regulated their conduct in accordance with his rules of humanity, was very greatly reduced. This positive success made the moral force of the laws of war loom very large in the minds of jurists, statesmen, and peoples.

Secondly, the enormous personal authority of Grotius himself caused most of his successors to follow closely the path he had marked out. His work in itself was so much better and so much more complete than anything that had preceded it, and than almost anything that came after it for a very long time, that his authority remained almost decisive, and even yet is not without weight. And his indirect influence has been even greater than his direct authority.

For he wrote as a scholar and a lawyer, but he achieved the work of a statesman; and throughout the eighteenth and nineteenth centuries the weight of his own words was reinforced by that of innumerable mediocre writers, not without fame in their own day, who were content to paraphrase and reproduce what he had created.

Thirdly, there is this important fact to remember: that in the seventeenth and eighteenth centuries the relations between nations in time of peace were very much more infrequent and unimportant than they are today. Their relations through war, whether as belligerents or neutrals, were a very much larger part of the whole of their intercourse than such relations are in the twentieth century. It was natural, therefore, that the law of war should present itself as the most important subject for legal regulation between states to all who concerned themselves with international relations.

These causes established the Grotian tradition so securely that it dominated the growth and development of international law throughout the nineteenth century. That it should have done so was contrary to the essential facts of the nature of international society, and contrary to the dictates of reason: for all the three causes above described ceased in the nineteenth century to hold good.

In the first place, in the nineteenth century, war so increased in scale and in destructiveness, that the contribution made to human welfare by the laws of war, while still considerable and by no means to be discounted, was yet negligible compared to what it had been. The rules of Grotius in his own day enormously reduced the suffering caused by an outbreak of war; but their efficacy was reduced by the inventions and development brought by every decade of the last century, until today no rules can prevent war from being infinitely more intolerable every time that it occurs.

In the second place, the authority of no one classical writer should in the nineteenth century have exercised the decisive influence which Grotius, directly or indirectly, exercised on international law. There was a great body of literature, and a great number of jurists who studied it; there was a large amount of custom and usage; there was material for great progress in the science and practice of international law, had there been a modern Grotius to effect it—some one with a great statesman's view of international law and with a great statesman's power of gaining acceptance for new conceptions and new obligations. It was against reason, therefore,

that the Grotian tradition should have continued to dominate the science of international law.

In the third place, the improvement of communications and the growth of international commerce and exchange so intensified the intercourse between nations that their war-relations became comparatively an insignificant part of the whole. This growth of intercourse demanded a corresponding growth in the international law of peace—a growth which, had it been adequate, would have rendered the law of war comparatively insignificant. But it was not adequate; there was a growth of law indeed, and much of the increased intercourse was regulated by Convention; but the law of peace lagged far behind the requirements it should have fulfilled, and the growth of interests and opinion which it should have reflected.

This last-mentioned shortcoming was the more remarkable in that the nineteenth century added to custom and reason as sources of international law, the method of international "legislation" by Conferences of States. This began at the Congress of Vienna and developed fitfully until Hague Conferences devoted themselves exclusively to the work of codifying and creating law to govern international relations. This method of legislation latterly became the most important source of international law; it was certainly the most spectacular, and had it produced good results, it might have added enormously to the legal value and to the moral authority of international law.

It might have been expected that this method of "legislation" would have produced attempts to deal by general rules with the great problems that absorbed the energies and attention of the whole world during the nineteenth century. There was material enough for law: the extraordinary development of colonisation in uncivilised parts of the world, the growing international solidarity of economic interests, the increasing cost and destructiveness of war, and the consequent increasing importance of preventing its outbreak, were all matters that seemed to demand the creation of rules. And in fact attempts were made to deal with them by Conference Legislation. The problems of colonisation produced some declarations about the slave trade, and much later some discussion of native rights and some regulation of colonial traffic in arms and liquor. The problems of commerce produced rules about the common rights

of the Society of States over international rivers and inter-oceanic canals—though in the development of these rules Conference Legislation played a smaller part than might have been expected. The problem of war produced some rules of doubtful value about recourse to mediation, and some machinery established at the Hague to secure the peaceful settlement of disputes.

But the principles underlying these rules were never worked out by the Conferences that enunciated them; they were left to develop by the slow growth of custom—or not to develop, as the case might be. It was the Grotian tradition that really dominated the use of Conference Legislation. As against the meagre and spasmodic treatment just indicated of the great problems of peaceful intercourse, the method of Conference Legislation was used to codify, confirm and amend drastically and repeatedly the laws of war on sea and land. The following list of Conference Conventions on the laws of war may be compared with the sparse "peace" results above referred to—

1856. Declaration of Paris on Maritime Law in time of war.
1864. Declaration of St. Petersburg forbidding the use of certain arms.
1868. Geneva Convention for the protection of the sick and wounded.
1868. Geneva Convention:—Additional Articles.
1906. Geneva Convention:—Amendment and extension.
1899. "Peace" Conference at the Hague: one Convention dealt with the peaceful settlement of international disputes; two Conventions and three Declarations dealt with the Law of War.
1907. Second "Peace" Conference at the Hague: two Conventions dealt with the Law of Peace, *eleven* Conventions and one Declaration dealt with the Laws of War on Land and Sea.
1909. Declaration of London on the Laws of War at Sea.

It is perhaps worth while to inquire why the method of Conference Legislation was applied with so much more persistence and thoroughness and apparent success to the law of war than to the infinitely more important problems of the law of peace.

Westlake explains the amelioration of the laws of war by the operation of two moral forces. "The cause of this rapid career of

improvement," he writes, "must be something more than the renewed belief in a commonwealth of mankind which has been mentioned above as marking our time. * * * Along with the renewal of that belief there has come a remarkable development of the sentiment of pity, of an enthusiasm of humanity which has caused a wider and keener sympathy with suffering than has perhaps ever before been known" (*Collected Papers,* pp. 278-9).

Now it may be remarked that both these moral forces might have found their expression in the improvement of the law of peace quite as logically as in that of the law of war. "A renewed belief in the commonwealth of mankind" and an "enthusiasm of humanity" might both have led to legislation for the better treatment of native races or to international legislation for the improvement of labour conditions, or to laws for the prevention of war. Indeed, it is remarkable that they did not. For there were other moral forces at work in the nineteenth century tending in the same direction. There was, for example, the wave of philanthropic feeling which swept England on the subject of the slave trade. And there was a widespread and persistent desire, springing from the renewed belief in the commonwealth of mankind and attested by the repeated recourse to settlement of international disputes by arbitration and by the calling of the Hague Conferences, to improve international law for its own sake, to regulate international relations on the basis of justice, and to build up a legal system which would replace force by law as the final arbiter of nations.

But all these forces were swept into the improvement of the laws of war. When they touched any concrete problem of international peace relations they led usually to the enunciation of some broad general principle; but this principle was not worked out into a comprehensive and practical system of law. Take, for example, the treatment of native races. In Annex 15 of the Treaty of Vienna there was a general declaration against the slave trade, which was condemned then as now by the conscience of the civilised world, and during the nineteenth century the same moral forces led to the abolition of slavery in various parts of the world. Not until the Berlin and Brussels Acts, however, was the principle of the Vienna Declaration even discussed internationally again. And then it led to some international Conventions, the inadequacy of which has been illustrated by the whole of subsequent African history. This

failure cannot be attributed to the lack of moral forces—Westlake himself is witness that they existed. Nor is it due to the fact that problems of colonial administration did not attract the attention of statesmen—in fact, every government with colonial possessions was perpetually preoccupied with such problems. Nor is it due to the lack of a real interest to be served—international agreements on the lines of the mandates now proposed might have done much to promote the true welfare of both white men and their native subjects. Westlake attributes the failure of international law to deal more effectively with the slave trade to the prevalent exaggerated idea of national independence (*Peace,* p. 323). This is another way of saying that it was due to a failure to appreciate the true function of international law. Statesmen and lawyers did not envisage the uses of international law for the prevention of suffering and abuse in time of peace; and Westlake's moral forces were diverted to endeavors to prevent abuse in time of war.

Similar illustrations may be taken from other parts of the history of international relations in the nineteenth century. The Congress of Vienna laid down a fundamental principle as to the rights of non-riparian states on international rivers. This principle indeed has had much recognition and some development during the last hundred years. But no international Conference has ever endeavored to "legislate" for its extension to straits, canals, ports and railways. Yet if the principle were valid in one sphere, it should have been extended to the others; and the immense growth of international commerce might have been expected so to extend it. Such extension would have been in the interests, not of landlocked states only, but of every state in the interdependent community of nations; it is an extension which the League of Nations will have to bring about and which it has indeed already begun to consider.

Again, Article 8 and Protocol 23 of the Treaty of Paris of 1856 introduced into international law certain rudimentary rights of mediation by third parties in disputes which threaten an outbreak of war. These rights were much used in connection with the Eastern Question; Sir Thomas Erskine Holland has much of interest to say about them. But they were scarcely mentioned in International Conferences until 1899; and neither Hague Conference gave them any substantial development. Yet one of the basic facts of international society was that a war between two states was of vital inter-

est to other states. Had the system of Conference Legislation been used as it might have been used, it would have so developed the rudimentary principle of 1856 that third parties would have been given not only an absolute right, but even a duty, to meditate and to enforce consideration and delay before any individual state threw international society into confusion by declaring war. Surely the prevention of war was as true an international interest as the prevention of abuse during war, and surely it was one which called as urgently for agreed regulation by Conference Legislation. Yet it is only after the Great War that those principles have been embodied in the Covenant of the League of Nations which should have logically developed from what was recognized and enshrined in a treaty sixty years ago.

Had international law developed as it is above suggested that it might have done, it is conceivable that the Great War might have been averted; it is even conceivable that the League of Nations might have come about by evolution instead of revolution. The failure of international law is due to many a powerful cause; no law can outstrip the moral standards of the mass of those who are subject to it. But, in part at least, it is due to the failure of the statesmen and jurists of the last century to use the moral forces of their day for the development of international law along the lines of true progress; and this in turn, it has been argued, is due to their preoccupation with the laws of war. It is for the statesmen and jurists of our day to bear this lesson continually in mind, and to apply it in the use they make of the new international machinery of the League.